Commercial Forgings Company *and* Lodge 1086, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO

Forgings Forever, Inc. *and* Lodge 1086, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO. Cases 8–CA–24748 and 8–CA–24904

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

Upon charges filed by Boilermakers Lodge 1086 (the Union), the General Counsel of the National Labor Relations Board issued an amended consolidated complaint and notice of hearing dated November 27, 1992. The amended complaint alleges that Respondent Commercial Forgings (Commercial) engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act by failing to pay employees termination pay and vacation pay due them, and by terminating its manufacturing operations without providing the Union notice and an opportunity to bargain over the effects of that decision; that Respondent Forgings Forever (Forgings) became the legal successor of Commercial with prior notice of the alleged unfair labor practices of Commercial, and, as such, is liable for them; and that Forgings engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) by refusing to recognize and bargain with the Union.

On March 30, 1993, the parties jointly filed a motion to transfer the proceeding to the Board and a stipulation of facts. The parties waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision and recommended Order. The parties agreed that the stipulation, with attached exhibits, including, inter alia, the initial and amended charges, the amended consolidated complaint and notice of hearing, and the answers, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties.

On November 17, 1993, the Board issued its Order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondents filed briefs in support of their respective positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record in this proceeding and makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Commercial, an Ohio corporation with an office and place of business in Cleveland, Ohio, was engaged in the business of operating an open die forging shop specializing in large forgings, related machining facilities, and a heat treating facility. During the year prior to May 15, 1992, Commercial, in conducting its business operations, sold and shipped from its Cleveland, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio.

Since about May 18, 1992, Forgings, an Ohio corporation with an office and place of business in Cleveland, Ohio, has been engaged in the business of operating an open die forging shop specializing in large forgings, related machining facilities, and a heat treating facility. Based upon a projection of its operations from May 18, 1992, until the date of the stipulation of facts, Forgings, in conducting its business operations, will annually sell and ship from its Cleveland, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio. The parties stipulated, and we find, that Commercial and Forgings have been, at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

For many years, and at all material times, the Union was the designated exclusive collective-bargaining representative of a unit of all Commercial employees with the exception of guards, professional employees, office employees, and supervisory personnel with authority to hire and fire (the Commercial unit), and was recognized as the representative by Commercial. This recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective from April 4, 1992 to April 3, 1993.

Commercial incurred a significant debt to Ameritrust Company National Association (ACNA). The loans were secured by various security interests and mortgages in the property of Commercial. In 1990, when Commercial was unable to meet its repayment obligations, ACNA directed Commercial to sell its assets or face foreclosure. Commercial's debt to ACNA at that time was far in excess of the market value of its as-

sets. Commercial also had other creditors whose claims were in excess of $500,000.

Sometime in January or February 1992,[1] negotiations began among Commercial, ACNA, and the principals who later formed Forgings, for the sale of all or part of the assets of Commercial to Forgings, which was incorporated on March 23. John Mencini, the chief executive officer and treasurer of Commercial and later president and treasurer of Forgings, was included in these negotiations. During the first week of May, the final provisions of a transaction were agreed upon, providing for the transfer of Commercial's assets, except for the real estate, to ACNA and their subsequent sale to Forgings.[2] The transaction was reduced to writing in a ''Collateral Realization Agreement,'' and executed on May 15.

On Friday, May 15, Mencini called a meeting of all employees during the workday. He announced that Commercial was immediately ceasing its business operations and that the employees were to gather their belongings and leave the premises. On the same day Mencini, on behalf of Commercial, wrote to the Union indicating that Commercial had ceased its business operations. This letter was the first notice given by Commercial to the Union of its business closing. At the time of its closing, Commercial employed 18 individuals, including 9 bargaining unit employees.

On Monday, May 18, Forgings began its business operations at the Commercial facility. Forgings continued the same type of business operation as that conducted by Commercial, uses the same physical facilities and the same equipment, and produces the same product. During the first 4 months of operations 90 percent of Forging's customers were the same as Commercial's.

When Forgings began operations, it employed nine individuals, all of whom except the chief financial officer previously had worked for Commercial. Three of these individuals worked for Forgings in managerial positions, two were office clerical employees, and four were primarily assigned to production work. One of the production workers, Walter Illingworth, was a 17 percent shareholder of Commercial and owns 20 percent of the shares of Forgings. Another, Walter Harris, had been a production supervisor at Commercial. Although Harris acts as a work coordinator at Forgings, he does not exercise supervisory authority. The other two production employees at Forgings, Earl Holland and Mike Sczesniak, were members of the bargaining unit at Commercial and perform similar duties at Forgings. Forgings did not hire another production employee until mid-July, when it hired Chris Langmo, who had previously worked for Commercial but was not on its payroll when Commercial ceased operations. Langmo subsequently left the employ of Forgings and was not replaced.

About May 21, Union International Representative Steven Jewell and a number of former employees of Commercial visited the Forgings facility. Jewell submitted a written grievance to Mencini signed by the former employees alleging breaches of the collective-bargaining agreement in connection with Commercial's closing and requesting documents establishing proof of the sale of assets. Commercial responded on May 22, asserting that it had discontinued doing business and denying any contract violations. Representatives of the Union met on June 5 with Mencini and Albert Fowerbaugh, Commercial's attorney, concerning the grievance. Commercial's representatives stated that there was no money to pay the liabilities asserted in the grievance, and that certain obligations, such as health insurance premiums until the end of May and pension contributions, had been paid. The union representatives stated that Commercial was also liable to the employees for vacation benefits accrued during the month of May as well as for severance pay. Commercial's representatives acknowledged the contractual obligation to pay severance benefits and stated that a possible liability existed regarding vacation pay. They also furnished the Union with a copy of the Collateral Realization Agreement as proof of the sale of assets.

During the course of the June 5 meeting, the union representatives inquired of Mencini and Fowerbaugh, in their capacity as officers and shareholders of Forgings, about the identity of the production employees employed by Forgings. Mencini stated that two former bargaining unit employees, Holland and Sczesniak, were working for Forgings. International Representative Ron Lyon then requested that Forgings recognize the Union as the representative of its production and maintenance employees. The request was denied by Fowerbaugh, who stated that the successorship clause of the collective-bargaining agreement did not apply because the assets had been purchased by Forgings from ACNA and not directly from Commercial.

Article 9.8 of the collective-bargaining agreement sets the requirement for termination pay in the event Commercial ceases doing business. Under the terms of this provision, the following employees of commercial were entitled to termination pay after Commercial ceased doing business and laid them off: Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks. Article 10 of the collective-bargaining agreement sets forth the provisions for employee vacation benefits. Article 10.9 states that 1 month's vacation

[1] All subsequent dates are in 1992 unless otherwise indicated.

[2] ACNA refused to take the real estate because of its concern for liability related to environmental conditions. The real estate is subject to a pending tax foreclosure case and the results of that case will terminate Commercial's ownership of the property. Commercial will not receive any of the proceeds of the sale of the real estate.

credit is due to any employee who works at least 15 days in a calendar month. All nine employees in the Commercial unit worked between May 1 and May 15, and were therefore entitled to 1 month's vacation credit for that period of time.

Since June 5, the Union has neither requested nor engaged in any grievance or negotiation meetings with Commercial. Commercial has paid no moneys to the Union or the affected employees in satisfaction of the Union's claims regarding vacation and termination pay benefits. Since June 5, Forgings has refused to recognize the Union as the bargaining representative of its production and maintenance employees. Commercial has engaged in no business operations since May 15, except to respond to inquiries from its creditors.

B. *Contentions of the Parties*

The General Counsel contends that Commercial unlawfully modified the termination pay and vacation pay provisions of the collective-bargaining agreement without the consent of the Union, in violation of Section 8(a)(1) and (5), by failing to pay these benefits to its employees. The General Counsel further asserts that Commercial violated Section 8(a)(1) and (5) by failing to give notice to the Union and an opportunity to bargain over the effects of its closing. The General Counsel argues that although Commercial was engaged in negotiations concerning the transfer of its assets for a period of months, it presented the Union with a fait accompli on the day of closing, thus precluding meaningful bargaining at a time when the Union had some measure of bargaining strength. The General Counsel further asserts that Forgings, as a successor under the principles of both *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), respectively, is liable for Commercial's unfair labor practices and is obligated to recognize and bargain with the Union. The General Counsel contends that Forgings violated Section 8(a)(1) and (5) by failing and refusing to engage in such bargaining. The General Counsel urges the Board to remedy these alleged violations with a cease-and-desist order and by ordering that Commercial bargain with the Union over the effects of its closing, that Commercial and Forgings be held jointly and severally liable for the termination pay and vacation pay due to the former Commercial employees as well as for limited backpay under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and that Forgings recognize and bargain with the Union as the bargaining representative of its employees.

The Respondents contend that Forgings is not the legal successor of Commercial. In this regard, the Respondents assert that this case is factually distinguishable from *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), because the Respondents are smaller employers, with a smaller proportion of represented employees, and because Forgings made changes in the method of operation at the facility. In addition, relying on *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), the Respondents argue that Forgings should not be found a successor to Commercial based on the small proportion of former bargaining unit employees hired, i.e., two of nine employees.

C. *Discussion*

Considering first the complaint allegation that Commercial violated Section 8(a)(1) and (5) by failing to give the Union notice and an opportunity to bargain concerning the effects of its termination of operations, we note that the parties have stipulated that Commercial announced to its employees on May 15 that it was immmediately ceasing operations; that it sent a letter to the Union on the same date informing the Union that Commercial had ceased operations; and that the letter was the first notice provided to the Union of this decision. It is well established that an employer that decides to terminate its operations and go out of business has an obligation to bargain about the effects of that decision with the union representing its employees. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Inherent in that obligation is a requirement that the union be given notice and an opportunity to bargain ''in a meaningful manner and at a meaningful time.'' Id. at 681–682. In this case, Commercial provided the Union no advance notice of its decision to cease operations and transfer its assets to Forgings. Instead, Commercial sent a letter to the Union on the same day that it informed the employees directly of the termination. Thus, Commercial presented the Union with a fait accompli, depriving it of an opportunity to bargain at a time when it had any measure of economic strength with respect to Commercial. In their brief, the Respondents make no argument concerning this allegation. We find that by failing and refusing to bargain with the Union concerning the effects of its decision to terminate its operations, Commercial has violated Section 8(a)(1) and (5) of the Act. *John R. Cowley & Bro., Inc.*, 297 NLRB 770 (1990).

We also find that Commercial violated Section 8(a)(1) and (5) by failing to pay unit employees the termination pay and vacation benefit pay due to them. The collective-bargaining agreement between Commercial and the Union provides for vacation pay credit for employees who have worked 15 days in a calendar month, as well as termination pay for employees in the event that Commercial ceases doing business. The parties stipulated that under these provisions, seven former bargaining unit employees are entitled to termination pay and all nine former Commercial unit em-

ployees are entitled to vacation pay for the month of May. The parties further stipulated that Commercial has made no payments in satisfaction of these obligations. The Respondents' brief does not address this allegation. We find that Commercial unilaterally changed the terms of the parties' collective-bargaining agreement by failing to pay its former employees the contractual benefits due to them without bargaining with the Union. *General Split Corp.*, 284 NLRB 418 (1987); *St. Louis Gateway Hotel*, 286 NLRB 863 (1987).[3]

The General Counsel asserts that Forgings is a successor to Commercial under the tests established in *Burns* and *Golden State*, supra. In *Burns*, the Supreme Court held that a new employer is obligated to recognize and bargain with the union representing the predecessor's bargaining unit employees where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by the union. The Supreme Court further found in *Fall River Dyeing*, supra, that the first inquiry focuses on the existence of substantial continuity, determined by considering ''whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs under the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.'' 482 U.S. at 43. A finding of substantial continuity does not require that the new and old operations be identical, but rather involves an assessment of the totality of the circumstances to determine whether ''those employees who have been retained will understandably view their job situations as essentially unaltered.'' Id., quoting *Golden State*.

The facts in the present case establish that Forgings acquired all of the assets formerly owned by Commercial, with the exception of the real estate. Moreover, Forgings continued the same type of business operation as Commercial, using the same facilities and equipment to produce the same product. During its first 4 months of operation, 90 percent of the customers served by Forgings were former Commercial customers. Eight of the nine individuals employed by Forgings had been employed by Commercial.

We find no merit in the Respondents' contention that despite these similarities, Forgings should not be held to be the successor of Commercial based on factual distinctions between *Fall River Dyeing* and the present case. The Respondents note that the overall size of the employers here is significantly smaller than those in *Fall River Dyeing*, and that the bargaining unit constitutes a smaller proportion of the total employment. However, the Respondents cite no precedent suggesting that the size of the employer or the bargaining unit is of any determinative consequence in deciding issues of successorship. The Respondents also argue that the method of operation under Forgings differed from that of Commercial, asserting that seven of the former bargaining unit employees were not hired because their skills were not needed, and that the production employees were supervised by a different individual under Forgings. In *Burns*, successorship was found despite the new employer's bringing in its own supervisors, where their duties were similar to those performed by the supervisors of the predecessor. *Burns* at fn. 4. In the present case, the parties' stipulation shows that the entire initial work force, with the exception of the chief financial officer, consisted of individuals formerly employed by Commercial, indicating a significantly greater continuity of supervision as well as unit employees.[4] The Respondents also concede in their brief that the two production employees carried over from Commercial would not see their jobs as essentially altered. Based on the above considerations, we find that substantial continuity exists between Commercial and Forgings as the employing enterprise.

Turning to the issue of the majority status of the Union in the Forgings bargaining unit, we note that four employees were primarily assigned to perform production work. One of these individuals, Illingworth, was a 17 percent owner of Commercial and owns 20 percent of Forgings, and therefore is excluded from the bargaining unit. A second production employee, Harris, was a supervisor at Commercial. The remaining two production employees were in the bargaining unit at Commercial. Thus, two of the three bargaining unit employees at Forgings were formerly represented by the Union at Commercial. We find that by June 5, when the Union requested bargaining with Forgings, Forgings employed a substantial and representative complement of its work force and that the Union represented a majority of Forgings' bargaining unit employees. In view of the majority status of the Union and the substantial continuity between Commercial and Forgings discussed above, we conclude that Forgings is a *Burns* successor and is obligated to recognize and bargain with the Union. We further conclude that

[3] Commercial's assertion at the June 5 meeting that no money remained to pay the liabilities claimed by the Union does not constitute a defense to its failure to meet its contractual obligations. See *General Split*, supra.

[4] In this regard, the Respondents also rely on *Howard Johnson*, supra, in asserting that no successorship should be found because Forgings hired only two of Commercial's nine unit employees. We find *Howard Johnson* distinguishable from the present case. In *Howard Johnson*, the Supreme Court found no substantial continuity of the work force where the new employer decided to ''select and hire its own independent work force,'' and hired only 9 of the former employer's 53 employees for inclusion in a new work force of 45 employees. 417 U.S. at 259. In addition, none of the supervisors of the former employer were hired.

Forgings violated Section 8(a)(1) and (5) of the Act by its failure and refusal to bargain with the Union.

In *Golden State*, the Supreme Court held that an employer that acquires substantial assets of a predecessor and continues without substantial change the predecessor's business operations may also be required to remedy the unfair labor practices of the predecessor if it was on notice of the unlawful conduct. Having already found the requisite continuity of operations above, we must determine whether Forgings had knowledge of the unfair labor practices committed by Commercial. In its answer to the amended consolidated complaint, Forgings denied knowledge of Commercial's violations. The Board, however, may conclude that a successor had the necessary knowledge based on reasonable inferences from the record as a whole. *Robert G. Andrew, Inc.*, 300 NLRB 444 (1990). We find that the record in this case supports such an inference. Mencini, the president of Forgings, was previously the chief executive officer of Commercial. By at least January or February, Mencini knew that Commercial intended to sell its assets; indeed, he participated in sale negotiations. Mencini also signed the letter to the Union belatedly informing it of Commercial's closing on the same day that he announced that decision to employees. Moreover, Mencini was present at the June 5 meeting where he or Fowerbaugh, or both, asserted that there was no money available to meet Commercial's obligations regarding vacation pay and termination pay. Thus Mencini was personally involved in the conduct found to constitute unfair labor practices by Commercial. We impute his knowledge to Forgings, and conclude that Forgings is a *Golden State* successor jointly and severally liable for remedying Commercial's unfair labor practices. See *Bell Glass Co.*, 293 NLRB 700, 708 (1989).

CONCLUSIONS OF LAW

1. Respondents Commercial Forgings Company and Forgings Forever, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Lodge 1086, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees with the exception of guards, professional employees, office employees, and supervisory employees with authority to hire and fire constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been the exclusive representative of all unit employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Forgings is the successor employer to Commercial. Forgings is liable to remedy the unfair labor practices of Commercial, and is obligated to recognize and, on request, bargain with the Union as the exclusive representative of bargaining unit employees.

6. By failing and refusing to bargain with the Union concerning the effects of its decision to terminate its operations, Commercial violated Section 8(a)(1) and (5) of the Act.

7. By unilaterally modifying the terms of its collective-bargaining agreement with the Union by failing to pay employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks the termination pay due to them and by failing to pay all of its former bargaining unit employees the vacation pay due to them, Commercial violated Section 8(a)(1) and (5) of the Act.

8. By failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of its bargaining unit employees, Forgings violated Section 8(a)(1) and (5).

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist and that they take certain affirmative action to effectuate the policies of the Act. To remedy Commercial's unlawful failure and refusal to bargain with the Union about the effects of its closing, we shall order it to bargain with the Union, on request, concerning the effects of that decision. Because of Commercial's unlawful failure to bargain with the Union about its decision to cease operations, the bargaining unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to require not only that Commercial bargain with the Union, on request, about the effects of the closing, but we shall also require a limited backpay remedy designed both to make the employees whole for losses as a result of Commercial's failure to bargain, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. We shall do so by requiring the Respondents, jointly and severally, to pay backpay to unit employees in the manner required in

Transmarine Navigation Corp., 170 NLRB 389 (1968).[5]

The Respondents shall pay unit employees backpay at the rate of their normal wages when last in Commercial's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) The date Commercial bargains to agreement with the Union on those subjects pertaining to the effects of the termination of operations on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of Commercial's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these employees exceed the amount they would have earned as wages from the date on which Commercial terminated its operations to the time they secured equivalent employment elsewhere, or the date on which Commercial shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than the amount these employees would have earned for a 2-week period at the rate of their normal wages when last in Commercial's employ. Interest on all sums shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, to protect the rights of Forgings, which will be liable with Commercial for backpay arising from the bargaining over the effects on the unit employees of Commercial's closing, it shall be notified by Commercial of such effects bargaining and, at its option, have the right to participate in that bargaining between Commercial and the Union.

Having found that Commercial has unalwfully failed to make contractually required payments of vacation and termination pay benefits, we shall order Commercial and Forgings, jointly and severally, to make whole the Commercial unit employees by making all such payments, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondents shall reimburse unit employees for any expenses ensuing from Commercial's failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1979), with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, we shall order Forgings to recognize and, on request, bargain with the Union as the representative of its bargaining unit employees. Finally, in view of Commercial's termination of its operations, we shall order the Respondents to mail copies of the notice to all Commercial unit employees.

[5] Member Cohen agrees that it is appropriate to enter a *Transmarine* monetary order against Commercial as a remedy for its refusal to bargain about the effects of its closing. However, he would not impose that monetary order against Forgings (the successor) with respect to the two Commercial employees whom it hired. In this regard, he notes that these employees were hired without hiatus, and thus they suffered no loss of employment by reason of the closing. In addition, a backpay order against Forgings, incorporating a minimum of 2 weeks of backpay, would essentially require Forgings to pay the employees twice for the same work. In these circumstances, the order as to Forgings is punitive rather than compensatory.

Further, in Member Cohen's view, the instant case differs from the typical *Golden State* situation. In that situation, the successor can avoid or reduce liability by promptly hiring the victims of the predecessor's unlawful conduct. By contrast, the instant case involves a *Transmarine* remedy. If *Golden State* is applied to a *Transmarine* remedy, as his colleagues have done, the successor must pay the 2-week minimum backpay, even if the successor promptly hires the victims. Where, as here, the successor has hired the victims without hiatus, it is inequitable and punitive to impose that remedy on the successor. Nor does the imposition of the *Transmarine* remedy on the successor assist in the effectuation of the ''effects'' bargaining order. The order does not require the successor to bargain on effects.

Member Cohen notes his colleagues' suggestion that Forgings could have negotiated with Commercial for protection against liability. Concededly, as to employees not to be hired, Forgings could have negotiated in this respect, and Member Cohen joins his colleagues in finding successor liability as to these employees. However, as to the two employees who would be hired and who would suffer no loss, it is wholly unrealistic to expect that Forgings would negotiate with Commercial to cover a no loss situation.

On a related point, Member Cohen notes his colleagues' speculation that there *may* have been a loss by the two employees. However, the General Counsel does not allege, and the evidence does not even remotely suggest, such a loss. Indeed, the liability at issue is confined to the 2 weeks of backpay that is envisaged by *Transmarine* when there is no actual loss.

Members Stephens and Devaney do not find the *Transmarine* backpay remedy imposed on Forgings with respect to the two employees hired by Forgings to be punitive. The *Transmarine* remedy is designed to compensate employees for losses due to Commercial's failure to bargain and to promote bargaining by Commercial. Forgings' liability for this limited backpay is based solely on its status as the *Golden State* successor to Commercial, not on any action by Forgings itself. In determining that Forgings is a successor under *Golden State*, we have already found that Forgings had notice of Commercial's unfair labor practices at the time of the transfer of operations. Therefore, Forgings had the opportunity to consider the implications of the unfair labor practices, including its own potential liability for a remedy, in negotiating the transfer. With respect to Member Cohen's ''no loss'' argument, it is not possible to conclude from the record in this case that the two employees in fact suffered no losses because they were immediately hired by Forgings. The record does not reveal whether their wage rate at Forgings is equivalent to their former rate. Further, bargaining may well have resulted in monetary or other benefits to the employees if it had taken place at a time when Commercial needed the employees' services. Finally, Members Stephens and Devaney disagree with Member Cohen's implication that, for the purpose of remedying lost bargaining opportunities, the burden of showing actual loss or alleging a particular loss is on the General Counsel.

ORDER

A.

The National Labor Relations Board orders that Respondent Commercial Forgings Company, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union concerning the effects of its decision to terminate its operations.

(b) Unilaterally modifying the terms of its collective-bargaining agreement with the Union by failing to pay employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks the termination pay due to them and by failing to pay all of its former bargaining unit employees the vacation pay due to them.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union on request concerning the effects of Commercial's decision to terminate its operations.

B.

The National Labor Relations Board orders that Respondent Forgings Forever, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees in the following appropriate unit:

> all employees with the exception of guards, professional employees, office employees, and supervisory employees with authority to hire and fire.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the collective-bargaining representative of its bargaining unit employees.

C.

The National Labor Relations Board orders that Respondents Commercial Forgings Company and Forgings Forever, Inc., Cleveland, Ohio, their officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally make whole bargaining unit employees for any losses they may have suffered as a result of Commercial's failure and refusal to bargain with the Union concerning the effects of its termination of operations in the manner set forth in the remedy section of this decision.

(b) Jointly and severally make all contractually required payments of termination pay benefits to unit employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks, and vacation pay benefits to all former Commercial unit employees, with interest.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Forgings' facility in Cleveland, Ohio, and mail to all employees in the Commercial bargaining unit at the time of Commercial's termination of operations copies of the attached notices marked ''Appendix A'' and ''Appendix B.''[6] Copies of the notices, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representatives, shall be mailed to all former Commercial bargaining unit employees and shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with Lodge 1086, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO concerning the effects of our decision to terminate operations.

WE WILL NOT unilaterally modify the terms of our collective-bargaining agreement with the Union by failing to pay employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks the termination pay due to them and by failing to pay all bargaining unit employees employed on the date of our termination of operations the vacation pay due to them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union, on request, concerning the effects of our decision to terminate our operations.

WE WILL make whole bargaining unit employees for any losses they may have suffered as a result of our failure and refusal to bargain with the Union concerning the effects of our termination of operations.

WE WILL make all contractually required payments of termination pay benefits to former unit employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks, and vacation pay benefits to all former unit employees employed on the date of our termination of operations, with interest.

COMMERCIAL FORGINGS COMPANY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the collective-bargaining representative of our employees in the following appropriate unit:

> all employees with the exception of guards, professional employees, office employees, and supervisory employees with authority to hire and fire.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union as the collective-bargaining representative of our bargaining unit employees.

WE WILL make whole bargaining unit employees for any losses they may have suffered as a result of Commercial Forgings' failure and refusal to bargain with the Union concerning the effects of its termination of operations.

WE WILL make all contractually required payments of termination pay benefits to former Commercial unit employees Robert J. Black, Reinhard Lee, Charles Ernest Lewis, Albert Omahan, James Rusnek, Richard Schultz, and Fred Sparks, and vacation pay benefits to all former Commercial unit employees, with interest.

FORGINGS FOREVER, INC.